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THE DETENTION, CONFINEMENT, AND INCARCERATION OF PREGNANT WOMEN FOR THE BENEFIT OF FETAL HEALTH

APRIL L. CHERRY*

In 1998, Yuriko Kawaguchi appeared before Cleveland, Ohio Municipal Court Judge Patricia Cleary and entered a guilty plea to a fifth-degree felony forgery count resulting from her use of a counterfeit credit card. Approximately two weeks before her sentencing hearing, Ms. Kawaguchi wrote to Judge Cleary, informing the judge that she was pregnant and wished to end her pregnancy by obtaining an abortion. At the sentencing hearing the judge objected to the defendant's plans to obtain an abortion and offered her a "quid pro quo" deal. If the defendant agreed to bring the fetus to term, Judge Cleary promised to sentence her to probation. If Ms. Kawaguchi insisted on having the abortion, then the Judge indicated that she would sentence Ms. Kawaguchi to a prison term of six months. Ms. Kawaguchi refused "the deal." By the time Ms. Kawaguchi was released by an order of the Eighth District Court of Appeals granting bond, she was too far along in her pregnancy to obtain a legal abortion in the State of Ohio.[1]

It is difficult, if not impossible, to know whether cases as egregious as Ms. Kawaguchi's are common in American courts because such quid pro quo "deals" between judges and criminal defendants usually are not on the record. Nevertheless, we do know that some judges use incarceration, and threats thereof, to control the behavior of pregnant women who come before them in order to protect the fetuses. Some pregnant women who pose no risk to their fetuses come before judges as a result of crimes that are completely unrelated to their pregnancies, as in the case of Ms. Kawaguchi. Other pregnant women are before judges on civil or criminal charges

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[1] These facts were taken from *Cleveland Bar Association v. Cleary*, 754 N.E.2d 235 (Ohio 2001). *See also* Ohio v. Kawaguchi, 739 N.E.2d 392 (Ohio Ct. App. 2000).

related to their use of alcohol or illicit drugs—behavior that is believed to be detrimental to their fetuses. Others become involved with the state when their doctors report their non-conforming behavior, sometimes drug-related, to state social service agencies. Finally, others become involved with state agencies because their behaviors are restricted by state statutes designed to protect fetuses from the improvident behaviors of their mothers. Regardless of how these women become involved with the court or other state actors, judges use their power to detain women as a way to influence pregnancy-related decisions.

In *Kawaguchi*, the judge used incarceration to "encourage" the pregnant defendant to bring her fetus to term; in the end, incarceration prevented Ms. Kawaguchi from obtaining an abortion. In other cases, in hopes of benefiting the fetuses, judges have used incarceration as a way to prevent drug use by pregnant addicts.[2] Judges have also used incarceration, detention, orders of hospital confinement, and threats thereof, to compel pregnant women to access prenatal care or to submit to their physicians' directions regarding medical treatment for the benefit of fetal health,[3] even when such medical care is contrary to the pregnant woman's deeply held religious beliefs.[4] In every case, detention of the pregnant woman is predicated on some version of fetal rights and is meant to influence the pregnant woman's decision regarding the course of her pregnancy. Surely, in some cases, the threat of detention, confinement, or incarceration for the fetus's sake must inevitably lead some women to forego pregnancy altogether or to abort a fetus to avoid confinement. Finally, detentions, confinement, and incarceration for the sake of fetal health result in the normalization or standardization of motherhood. Only those who meet the state-enforced standard are permitted to reproduce without state interference. In the end, all of these detentions violate the pregnant woman's reproductive rights—rights to privacy and bodily integrity. Detention and commitment for the benefit of fetal health reduces pregnant women from citizens to "fetal containers" and "maternal environments."[5]

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[2] *See infra* notes 117-132 and accompanying text.

[3] *See infra* notes 51-116 and accompanying text.

[4] *See* Frank J. Murray, *Pregnant Woman in Custody After Refusing a Medial Exam*, WASH. POST, Sept. 1, 2000, at A4; Pamela Ferdinand, *Pregnant Sect Member Detained for Health Care*, WASH. POST, Sept. 1, 2000, at A4; David Abel, *Pregnant Sect Member in State Custody*, BOSTON GLOBE, Sept. 1, 2000, at A1.

[5] Many commentators have noted that pregnant women are reduced to pregnant "maternal environments" and "fetal containers" in obstetrical literature. *See, e.g.*, Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47,

At the heart of these confinements lies the belief that the pregnant woman's behavior has a negative long-term effect on the health of the fetus. This assumption is often fallacious, particularly when applied to the use of illicit drugs.[6] Nevertheless, these restrictions of women's physical liberty are poor solutions to the problem of maternal drug and alcohol use or other maternal behaviors that *may* result in poor fetal outcomes. In addition to a lack of significantly better fetal outcomes, detention inappropriately violates these women's physical bodily integrity and restricts their reproductive decision making. This Article argues that all these methods—detention, confinement, and incarceration—violate women's constitutional rights and in the end leaves a jurisprudence of physical integrity and reproductive rights that permits coercive action on the part of the state, even when non-coercion is the principal constitutional norm and a necessary prerequisite of democratic citizenship.[7]

This Article examines both the state's role in the detention, confinement, and incarceration of pregnant women for the purported benefit of fetal health, the constitutionality of these actions, and the rights the state endangers when it does act. Although this Article is about rights, it recognizes the potential dangers of rights discourse. Rights discourse can be at the very least disingenuous, if not dangerous, particularly when the conditions of rights are disconnected from the real needs of the people they are ostensibly intended to protect. Such disconnection results in either

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97 n.61 (1997) (noting that women are referred to as "maternal environments" in modern obstetrical practice); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 19-23 (1989) (noting the increasingly commoditized language used to describe pregnant women); Barbara Katz Rothman, *When a Pregnant Woman Endangers Her Fetus*, 16 HASTING CTR. REP. 24, 24-25 (Feb. 1986) (noting that women are referred to as "maternal environments" in modern obstetrical practice); George J. Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CTR. REP. 13, 14 (Dec. 1986); Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J. L. & RELIGION 73, 76 (1994) (arguing that pregnant women are treated as fetal containers in legal discourse); Charles A. Gardner, *Is an Embryo a Person*, NATION, Nov. 13, 1989, at 558 (referring to pregnant woman as a "maternal environment").

[6] For further discussion, *see infra* notes 37-43 and accompanying text. *See also*, LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997).

[7] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3 (3d ed. 2005) (asserting that constitutional liberty consists of freedom from government coercion and freedom to participate in government).

injustice or limited substantive justice.[8] In the cases of pregnant women who are confined or detained for the benefit of their fetuses,[9] rights discourse can divert our attention away from the social and economic conditions under which women live. Moreover, it can divert our attention away from the ways in which these women experience pregnancy and childbirth.[10] Nevertheless, rights discourse also can be of great assistance in the fight for social change.[11] In the circumstance of the detention and confinement of pregnant women for the purported benefit of fetal health, rights discourse has considerable merit. It recognizes both injustice and the social and economic conditions under which many women live. Furthermore, it reveals the very real need of women for social change by requiring respect for the bodies of women, refusing to objectify women and their bodies, and resisting the transformation of women into mere fetal containers.

Section One of this Article discusses the effect of drug policy on the detention and confinement of pregnant women. This section also outlines three types of "fetal protection measures" that result in the detention, confinement, or incarceration of pregnant women in the name of fetal health and examines the legal rationales behind these mechanisms. Section One then questions whether detention is an effective way to reach the state's articulated goal of better fetal outcomes. Section Two offers a discussion of the constitutional rights at issue. This section addresses the ways in which detention violates two essential components of women's

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[8] *See* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 566-67 (2002) [hereinafter Cherry, *Free Exercise Rights*]; April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 214 (1995) [hereinafter Cherry, *A Feminist Understanding*]; *see also* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2215 (1992) ("This process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged."); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401, 404-05 (1987).

[9] *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 566-67 (making a similar argument in the context of compelled medical treatment of pregnant women).

[10] Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 499 (1992) ("The call to rights has made clear these cases . . . could not occur but for the prior devaluation of women; that 'fetal interests' is a proxy for majoritarian interests; and that the utilitarian balancing test describes women as tools useful for serving the rest of society.").

[11] Williams, *supra* note 8, at 404.

rights: the right to be free from unwarranted detention and confinement and the right to reproductive decision making that is based in both the privacy and liberty doctrines. Section Two also focuses on the standards currently used by the United States Supreme Court both to assess the constitutionality of civil commitment, detention, and other types of confinement by the state and to evaluate violations of women's reproductive rights. With respect to the Court's detention and confinement jurisprudence, the Article examines both *United States v. Salerno*[12] and *Addington v. Texas*[13] and argues that the physical restraint of non-compliant pregnant women is unconstitutional because the state can neither articulate a satisfactory compelling interest nor demonstrate that confinement is the least restrictive alternative available to protect the state's interest.

With respect to reproductive rights jurisprudence, this Article argues that the proper standard for review of these detentions is found in *Griswold v. Connecticut*[14] and *Eisenstadt v. Baird*,[15] cases in which the Court articulated women's fundamental rights to reproductive decision making outside of the context of abortion. In these cases the Court describes privacy as a fundamental right with which the government cannot interfere without a showing of a compelling state interest and a demonstration that the government's chosen action is the alternative that is least restrictive of the individual's right. The government fails on its requisite showing when these standards are applied to the cases under discussion. This Article argues that there is no compelling state interest in incarceration for fetal protection and that detention is not the least restrictive alternative for these women. Furthermore, this Article argues that the less protective standard relating to abortion regulations, the undue burden standard articulated in *Planned Parenthood v. Casey,*[16] while not applicable to these cases as they do not relate to abortion, is also violated under the circumstances described herein. At the very least, the undue burden standard must be read to mean that the state cannot coerce a woman's reproductive decision making without violating the rights of privacy and liberty. Because detention is highly coercive of women's reproductive decision making, it must be understood to violate the principles articulated by the Court in *Casey.*

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[12] 481 U.S. 739 (1987).

[13] 441 U.S. 418 (1979).

[14] 381 U.S. 479 (1965).

[15] 405 U.S. 438 (1972).

[16] 505 U.S. 833 (1992).

Section Three suggests two additional ways of thinking about privacy and liberty that may better protect women's physical integrity and their other constitutional rights. First, the right to privacy should be viewed as an affirmative right. Second, privacy should be understood as an anti-totalitarian principle. Finally, this Article concludes by suggesting that investing our energies in basic health care and drug treatment for pregnant women is the more effective and constitutionally acceptable way to produce better fetal outcomes.[17]

I. PUNISHING PREGNANT WOMEN FOR THE BENEFIT OF FETAL HEALTH: CIVIL AND CRIMINAL SANCTIONS

The problem of poor fetal health is often blamed on pregnant women who use illicit drugs, alcohol, or otherwise behave in "unauthorized"[18] ways. In this context, physicians often act as state agents because they are encouraged and sometimes required to report women's "unauthorized" behavior to a state agency.[19] The state then seeks to "protect" the fetus from the unauthorized and unwise behavior of its mother in a variety of ways, including taking the pregnant woman into custody to ensure her "proper" or state-sanctioned behavior.

Court rulings and statutes that purport to protect fetuses are obviously hostile to women. They are designed to punish women who do not conform to our society's conception of women or our understanding of the good and proper mother. These women are deemed irresponsible or evil because they refuse to or are unable to comply with society's expectations

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[17] Another constitutional argument is that the detention, confinement, and incarceration of women who behave in deleterious ways to their fetuses due to religious decision making presents a violation of their free exercise rights. This First Amendment issue is not addressed in this article as I have previously addressed it at length. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 566-67.

[18] In this context, unauthorized behavior means any behavior that the healthcare provider or the state (through legislation and/or regulation) has delineated as harmful or potentially harmful to the fetus.

[19] For example, a current Wisconsin statute permits physicians and other health care professionals to violate their pregnant patients' confidentiality in order to report suspected drug or alcohol use to state authorities. *See* WIS. STAT. § 905.04(4)(e)(3) (2005). The author made a similar argument with respect to the use of physicians as state agents and its detrimental effect on pregnant women. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 619 (discussing physicians as state agents in the context of compelled medical treatment).

regarding their behavior, leading them to be subject to public censure.[20] *New York Times* columnist Bob Herbert notes:

> [T]hese laws are hostile to women. [They] are designed to punish them and thrust them into perverse conflicts with their own bodies, [and] are light years away from the best solutions. Alcoholism and drug addiction are illnesses. But the fetal protection movement has not been accompanied by any serious effort to provide women with the alcohol and drug treatment that they need or even, for that matter, adequate prenatal care. That is not part of the agenda.[21]

Pregnant women who use or abuse drugs are not part of the agenda; they are seen to have violated the basic social belief that good mothers are self-sacrificing. A pregnant woman who uses drugs is "viewed as self-indulgent, placing her desire to get 'high' ahead of the need of her offspring to be born healthy,"[22] and hence deserves contempt and punishment.

Although the experiences of pregnant women who are incarcerated are probably more demeaning than the experiences of women detained in other settings, these experiences highlight the punitive and demeaning nature of detention. In a 1999 publication, Amnesty International reported on several cases where incarcerated women were transported to the hospital in shackles and forced to labor and give birth while chained to a hospital bed.[23] These highlighted cases are not out of the ordinary. In fact, as of 1999, only fifteen states banned restraining pregnant women during labor.[24] Furthermore, attorney Barrie Becker observes that "judges falsely believe that jails and prisons provide better health care for the woman and the fetus than the care an addicted woman would obtain on her own."[25] This belief is

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[20] *See generally* GOMEZ, *supra* note 6.

[21] Bob Herbert, *Fetal Protection Conceals Real Agenda*, MILWAUKEE JOURNAL SENTINEL, June 16, 1998, at 12, *available at* 1998 WLNR 3044594 at *1.

[22] JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 103 (2002).

[23] AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, UNITED STATES OF AMERICA, RIGHTS FOR ALL (1999), *available at* http://web.amnesty.org/library/Index/engAMR510011999.

[24] *Id.*

[25] Barrie L. Becker, Note, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L. Q. 235, 237.

prevalent even though considerable research concludes that the reason that drug-addicted pregnant women "do not receive the care they need is not lack of incentive on their part; rather, there is a severe shortage of drug treatment programs which will accept pregnant women and provide prenatal and drug treatment services which address their unique needs."[26]

While the punitive nature of these detentions and confinements and the harms they cause to women may be obvious, their negative effect on fetuses, although less apparent, is nevertheless very real. Detentions and confinements result in fetal harm in two ways: by decreasing access to prenatal care and by subjecting the fetus to harmful conditions inside of the prison itself.[27] Women who use drugs or refuse medical treatment do not access prenatal care for fear of being punished. Because prenatal care, including maternal nutrition, is paramount in ensuring the health of the fetus, decreased access to prenatal care results in poor fetal outcomes.[28] Indeed, the nation's leading medical associations, including the American Medical Association, the American Academy of Pediatrics, and the American Public Health Association, have all opposed punitive measures against pregnant women who use drugs. Their opposition is due in part to their understanding that such measures will deter women from accessing much needed prenatal care and that the absence of such care certainly will have deleterious consequences for both maternal and fetal health.[29]

Likewise, prison detentions are extremely deleterious to fetal health. The vast majority of prisons provide little or no prenatal care and no

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[26] *Id.* at 239-40.

[27] *See* San Durrenberger, *Solution Lies in Help, Not Jail*, ARIZONA REPUBLIC, May 21, 2004, at 4 (arguing that the incarceration of pregnant women to treat health problems is not in the best interest of fetuses or their mothers).

[28] American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS'N. 2663, 2667 (1990); U.S. GENERAL ACCOUNTING OFFICE, DRUG EXPOSED INFANTS: A GENERATION AT RISK (1990), *available at* http://www.gao.gov/cgi-bm/ getrpt?HRD-90-138.

[29] *See* American Medical Association Board of Trustees, *supra* note 28, at 2667; Committee on Substance Abuse, American Academy of Pediatrics, *Drug Exposed Infants*, 96 PEDIATRICS 364, 366-67 (1995) (This article champions rehabilitation and stresses the use of education and research to combat in-pregnancy drug use: "Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health . . . ."); American Public Health Association, *Public Policy Statement No. 9020, Illicit Drug Use by Pregnant Women*, 81 AM. J. PUB. HEALTH 253, 253 (1991) (recommending "that no punitive action be taken against pregnant women who are users of illegal drugs when no other illegal acts . . . have been committed").

staff training regarding the needs of pregnant women.[30] Moreover, prison conditions such as overcrowding, poor nutrition, and exposure to contagious diseases present a considerable danger to the health of the fetus.[31] In fact, the pregnancies of women who are incarcerated are much more likely to end in miscarriage than those of women in general.[32] Studies have found that pregnant drug addicts in prison are more likely than non-incarcerated pregnant drug addicts to have miscarriages and to give birth to children with abnormalities.[33] Finally, incarcerated addicts often have access to illegal drugs as illegal drugs continue to be readily available in prison.[34] When judges and legislators turn their attention to the perceived fetal health problems resulting from behaviors such as the drug or alcohol use of pregnant women, they undertake to "protect" the fetus from its mother. These protective measures have included taking the pregnant woman into state custody in an attempt to ensure that her behavior will not deleteriously affect the fetus. Underlying state detention is a legal culture that seems to prefer the real or imagined needs of the fetus over and above the constitutional interests of the pregnant woman. The following sections discuss the effects of American drug and alcohol policy on pregnant women and the constitutional interests of pregnant women in avoiding detention or confinement for the perceived sake of the fetus.

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[30] *See* John C. Coughenour, *Separate and Unequal: Women in the Federal Criminal Justice System*, 8 FED. SENT. R. 142, 143 (1995), *available at* 1995 WL 862005, at 3 (federal prisons are ill equipped to care for pregnant women; inadequate prenatal and obstetric care are available); John Pacenti, *Prenatal Care at Jail Criticized*, PALM BEACH POST, May 9, 2004, at 1C; Ellen Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189 (1989); *see also* Robert T. Downs, *The Right to Procreate While Incarcerated: A Look at the 'Obvious' Differences Between Male and Female Inmates*, 12 S. CAL. REV. L & WOMEN'S STUD. 67, 100 (2002) (the needs of pregnant inmates are typically neglected by prisons that are already inadequate to provide medical care); Deborah J. Krauss, Note, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523, 537 (1991).

[31] Krauss, *supra* note 30, at 537; Alan Elsner, *Supermax Prison: A Growing Human Rights Problem*, 28 CHAMPION 36, 43 (2004) (noting that in most state prisons, pregnant women get the same food as other inmates).

[32] Jean Reith Schroedel & Paul Pertz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL'Y & L. 335, 350-51 (1994).

[33] *See, e.g.*, SCHROEDEL, *supra* note 22, at 105 (citations omitted).

[34] *See* Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, § 1, at 1; *see also* BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS & FETUSES 141 (1992) (noting the ease of obtaining illicit drugs in prison and the lack of prison prenatal care).

A. The Effects of Drug and Alcohol Policy on the Detention of Pregnant Women

Many of the detentions of pregnant women for the purported benefit of the fetus are predicated on the woman's drug or alcohol use. Although the courts have long understood those dependent on drugs or alcohol as diseased and deserving of treatment,[35] courts have not treated pregnant women who are alcohol- or drug-dependent in the same regard. As one commentator noted, "it is an addicted woman who becomes pregnant, not a pregnant woman who becomes addicted."[36] Nevertheless, alcohol- and drug-dependent pregnant women have been increasingly subject to criminal and civil penalties arising out of their dual status as pregnant and substance-dependent. In the name of fetal health, authorities penalize women in order to protect fetuses from the unwise behavior of their mothers.

Undeniably some fetuses are harmed by in utero exposure to alcohol, illicit drugs, and other lawful substances. Newborns born to drug-dependent women can suffer from a host of medical, developmental, and behavioral problems.[37] However, not all children born to women who used illicit drugs during their pregnancies are permanently affected by that exposure.[38] Not only is the presence and severity of these problems dependent upon the nature of their mother's drug use,[39] the scientific evidence demonstrating the link is itself uncertain.[40] Medical evidence

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[35] *See, e.g.*, Linder v. United States, 268 U.S. 5, 18 (1925) (recognizing drug addiction as a disease); Robinson v. California, 370 U.S. 660, 666 (1962) (deeming punishment for the status of being addicted cruel and unusual punishment, impermissible under the Eighth Amendment); Huff v. State, 568 P.2d 1014, 1017 (Alaska 1977) (recognizing persons addicted to narcotics are diseased and proper subjects for medical treatment).

[36] Kathryn T. Jones, *Prenatal Substance Abuse: Oregon's Progressive Approach to Treatment and Child Protection Can Support Children, Women, and Families*, 35 WILLAMETTE L. REV. 797 (1999).

[37] Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 626 (1994).

[38] *Id.* at 627.

[39] *Id.* at 628.

[40] Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 336 (1999) [hereinafter De Ville & Kopelman, *Right Goal, Wrong Remedy*]; *see also* Kenneth A. De Ville and Loretta Kopelman, *Moral and Social Issues Regarding Pregnant Women Who*

regarding the harmful effect of alcohol on a developing fetus is much better understood. Alcohol is a teratogen, an agent that causes malformation of the developing embryo.[41] Maternal alcohol consumption can result in mental retardation and other physical and mental handicaps in the resulting child.[42] But again, the severity of these problems is dependent on the nature of their mother's alcohol consumption.[43] Because the effects of alcohol and drug abuse on the fetus can vary widely, the state's actions regarding pregnant abusers are difficult to justify on the basis of scientific evidence.

Although there may be other possible solutions, many jurisdictions have invoked the criminal law to address the difficulties that result from maternal drug and alcohol use. For example, as of 1999, more than 200 women who were pregnant or who had recently given birth had been arrested for the avowed benefit of fetal rights and fetal health.[44] Furthermore, as Lynn Paltrow, Executive Director of the non-profit National Advocates for Pregnant Women, has reported, the vast majority of these women are "low-income women of color with untreated drug addictions."[45] These prosecutions have taken a particularly oppressive turn in South Carolina where the legislature declared, and the state supreme court concurred, that viable fetuses are children. Consequently, South

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Use and Abuse Drugs, 25 OBSTETRICS AND GYNECOLOGY CLINIC OF NORTH AMERICA 237, 237-54 (1998) [hereinafter De Ville & Kopelman, *Moral and Social Issues*]; GÓMEZ, *supra* note 6.

Initial Studies by Dr. Ira Chasnoff and his colleagues suggested a correlation between the use of cocaine during pregnancy and instances of premature birth, low birth weight, and higher rates of physical, mental, and emotional problems. *See* Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985). These claims have been refuted by many other scientists. *See, e.g.*, Nancy L. Day & Gale A. Richardson, *Comparative Teratogenicity of Alcohol and Other Drugs*, 18 ALCOHOL RES. WORLD 42 (1994).

[41] *See* Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses to Its Impact on Native Americans*, 70 N.D. L. REV. 1, 18 (1994).

[42] *Id.* at 4 ("Fetal alcohol syndrome (or FAS) is the name given to a pattern of major and minor physical malformations, growth deficiencies, and central nervous system abnormalities caused by maternal alcohol use during pregnancy. FAS is well defined for the children most severely affected by prenatal alcohol exposure." Fetal alcohol effects or FAE is a milder or more subtle form of FAS.).

[43] *Id.* at 18.

[44] Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1001 (1999).

[45] *Id.*

Carolina's criminal child abuse and neglect and homicide statutes apply to any actions or activity of pregnant women that may result in fetal harm or fetal death.[46] Nor have the issues addressed by the criminal law been limited to drug and alcohol dependency. Pregnant women who simply refused to act as their physicians suggested or as the state agency thought appropriate have been subject to criminal sanction.[47] In addition to criminal approaches, many jurisdictions use child protection statutes to justify removal of alcohol- and drug-affected infants from their mothers directly after birth. As of 1999, twelve states required physicians to report drug use by pregnant women to state child welfare agencies.[48]

Unlike the use of criminal law, direct court intervention requiring the detention of pregnant women is less often noted and discussed. Intervention has included court orders that confine pregnant women to hospitals, sometimes for particular medical procedures, or in prisons for the duration of their pregnancies based on their unwillingness or inability to

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[46] Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1995), *cert. denied*, 523 U.S. 1145 (1998) (holding that behavior by pregnant woman that might endanger her fetus, including illegal drug use, is actionable under the state criminal child neglect statute and punishable by ten years in prison); State v. McKnight, 576 S.E.2d 168 (S.C. 2003), *cert. denied*, 540 U.S. 819 (2003) (woman who used crack cocaine sporadically during her pregnancy convicted of homicide by child abuse after delivering a stillborn child). A similar trend has been seen in Hawaii. *See, e.g.*, State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (reversing conviction of manslaughter for woman convicted of causing the death of her newborn as a result of smoking methampetamine); Editorial, *Reversal in Aiwohi Case Makes Sense*, HONOLULU ADVERTISER, July 8, 2005, at 18A (Aiwohi pled no contest to manslaughter in connection with the death of newborn and was sentenced to ten years probation on the theory that her methamphetamine use poisoned her infant in utero and caused its death.).

[47] *See* GOMEZ, *supra* note 6, at 42-46 (discussing the prosecution of Pamela Rae Stewart in San Diego, California).

[48] Indeed the most common legal action against women who use drugs or alcohol during their pregnancies is the use of child abuse and neglect statutes to remove newborns from their mothers as a result of a positive toxicology screen taken shortly after birth. *See, e.g.*, Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 519-25 (1992). Although this approach is popular with legislatures and district attorney offices, scientists and doctors warn that the "stigmatizing terms" used in the criminal law and by child protective agencies "not only lack scientific validity" but also "harm[] the children to which they are applied by . . . leading to policies that ignore factors including poverty, that play a much more significant role in their lives." Press Release, Top Medical Doctors, Scientists & Specialist Urge Major Medial Outlests Not to Create "Meth Baby" Myth (July 27, 2005) (on file with author) (press release sent to CBS National News, Minneapolis Star Tribune, New York Times and others from more than 90 doctors and scientists).

comply with behavior that a state official or physician believes is important for the health of their fetuses. The relevant jurisdictions have taken three approaches. Some courts have used either *parens patriae* or child welfare statutes to take custody of a fetus the court views as endangered by its mother's behavior. Other courts have used their power in criminal proceedings to incarcerate pregnant women found guilty of minor crimes who have been discovered using alcohol or illicit drugs while pregnant. In these cases, women are incarcerated for the sole purpose of "protecting" their fetuses. Finally, some state legislatures have been directly involved. In at least three instances, state legislatures have passed statutes that permit the state to civilly commit pregnant women who use drugs or alcohol. [49] All of these solutions to the perceived problem of maternal non-compliance force forms of state mandated pregnancy and motherhood. Those who do not comply with these mandates are subject to penalty, censure, and most importantly loss of liberty and decision making power.

In the remainder of this section, this Article outlines and analyzes the three ways in which states have taken pregnant women into custody in order to protect fetal health without fully considering the legal interests of the pregnant woman that are at stake. These methods include: (1) the use of the court's *parens patriae* power, including judicial interpretation of child neglect and abuse statutes to include the protection of fetuses; (2) the use of civil commitment statutes to confine pregnant women in hospitals; and finally (3) the use of incarceration during the pregnancy as a way to ensure maternal compliance.[50] Underlying all of these methods of detention is the prioritization of fetal life and fetal health over the constitutional liberty interests of the pregnant woman and the development of a state-sanctioned form of mothering.

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[49] *See* MINN. STAT. ANN. § 253B.05 (West 2005); MINN. STAT. ANN. § 626.5561(1)-(2) (West 2005) (permitting emergency commitment of pregnant woman who have used a controlled substance); S.D. CODIFIED LAWS ANN. § 34-20A-63 (allowing pregnant women who use alcohol or drugs to be involuntarily committed to a treatment facility); WIS. STAT. §§ 48.133, 48.193, 48.213(l)(b) (2005) (establishing procedures for taking a pregnant woman into custody when fetus is in need of protection or services).

[50] This ultimate method (incarceration) ensures neither maternal compliance nor fetal health. *See* April Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 TEX. J. WOMEN & L. 245, 253 (1999).

B. Use of *Parens Patriae* Power and Child Protection Statutes to Detain Pregnant Women

Courts have used civil law remedies to take pregnant women into state custody and to compel state-sanctioned maternal behavior deemed necessary for the health or life of fetuses. In some instances, courts have relied upon their common law *parens patriae* powers to permit the states' "limiting parental freedom and authority in things affecting the child's welfare."[51] In other instances, courts have relied upon statutory provisions in the state's child welfare law to take custody of the fetus, asserting that the legislative intent of the statute was to include a viable fetus within the statutory definition of "child."[52]

1. The Case of Compelled Medical Treatment

In compelled medical treatment cases, a court compels non-consensual medical treatment deemed necessary by a physician on a pregnant woman. In many cases, the state takes custody of the fetus under its *parens patriae* powers in order to compel the treatment.[53] As I have noted elsewhere, many of these cases involve a pregnant woman's religious objection to treatment.[54] *Jefferson v. Griffin Spalding County* is one such case.[55] *Jefferson* involved a pregnant woman who refused to consent to cesarean section surgery on religious grounds, even though the hospital physician predicted that her fetus would surely die and that she would likely die without surgery.[56] The trial court ordered the cesarean section surgery based on its finding that "as a matter of law . . . this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia."[57] The trial court also concluded that Jefferson's fetus was a child

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[51] Prince v. Massachusetts, 321 U.S. 158, 167 (1944); *see also In re* E.G., 549 N.E.2d 322, 327 (Ill. 1989) (finding that the *parens patriae* power was greatest when health care issues are potentially life threatening).

[52] Wisconsin *ex rel.* Kruzicki, 561 N.W.2d 729, 732 (Wis. 1997).

[53] See Cherry, *Free Exercise Rights*, *supra* note 8, at 596-99, 603-08, for a fuller discussion of this issue.

[54] *Id.*

[55] 274 S.E.2d 457 (Ga. 1981).

[56] *Id.* at 459.

[57] *Id.*

"without the proper parental care and subsistence necessary for his or her physical life and health."[58] For that reason, the court granted temporary custody of the fetus to the state's child welfare agency, authorizing it "to make all decisions, including giving consent to the surgical delivery appertaining to the birth of this child."[59] Mrs. Jefferson filed a motion to stay the trial court's decision which the Supreme Court of Georgia denied summarily, citing, *inter alia*, the United States Supreme Court decision in *Roe v. Wade*.[60]

The District of Columbia Superior Court has also compelled at least one cesarean section surgery by taking custody of a fetus under the state's *parens patriae* power. In *In re Madyun*, the court compared the fetus to a child and asserted its *parens patriae* power to both detain Ms. Madyun at the hospital and to impose the non-consensual surgery over her religious objections. The court stated that its order was made to protect the state's interest in the viable fetus.[61]

New York State trial courts have also taken custody of fetuses and their mothers by asserting the state's *parens patriae* power. For example, in *In re Jamaica Hospital*, the trial court asserted that the state's significant interest in a non-viable, eighteen-week-old fetus outweighed the mother's right to refuse lifesaving medical treatment on religious grounds.[62] The court exercised its *parens patriae* power to appoint a special guardian for the fetus and to allow the guardian to order a blood transfusion for the mother, a Jehovah's Witness.[63] The court recognized that the eighteen-

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[58] *Id.*

[59] *Id.* The trial court further stated that the "intrusion . . . into the life of [Mrs.] Jefferson and her husband . . . [was] outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live." *Id.* at 460.

[60] *Id.* See also *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999) which reached a result similar to that in the *Jefferson* case but did not involve a religious objection. In *Pemberton*, the pregnant woman at issue was returned to the hospital by county sheriff's deputies as ordered by the state court after having left the hospital in order to avoid an unwanted cesarean section.

[61] *In re* Madyun, 114 Daily Wash. Law Rptr. 2233, 2240 (D.C. Super. Ct. 1986); *see also In re* Steven S., 178 Cal. Rptr. 525 (Cal. Ct. App. 1981) (pregnant woman detained in mental health hospital after trial court determines that her fetus is a "dependent child" under California child protection statutes, dismissed on appeal as moot).

[62] *In re* Jamaica Hospital, 491 N.Y.S. 2d 898 (N.Y. Sup. Ct. 1985).

[63] 491 N.Y.S. 2d at 899-900. The fetus at issue was only eighteen weeks old and in no way viable. *Id.*

week-old fetus was not yet viable and, therefore, concluded that the state's interest was not "compelling," as defined by *Roe*.[64] Despite this realization, the court held that "in the context of abortion, . . . the state has a *significant interest* in protecting the potential of human life represented by an unborn fetus."[65] Moreover, the court in *In re Jamaica* likened the fetus to a child[66] and asserted its *parens patriae* jurisdiction to appoint a physician as guardian to the fetus.[67] The guardian was given the authority "to do all that in his medical judgment was necessary to save [the fetus's] life, including the transfusion of blood into the mother."[68]

2. The Detention of Drug-Dependent Pregnant Women and The "Protective Custody" of Their Fetuses

Wisconsin ex rel. Angela v. Kruzicki[69] is another example of how courts have used their power to take custody of a fetus in utero, thereby necessitating custody of the pregnant woman. The *Kruzicki* court based its detention of the pregnant woman on its statutory jurisdiction allowing it to detain and protect children in need of supervision.[70]

In some ways, the facts of *Kruzicki* are similar to the facts found in *Jefferson, In re Jamaica Hospital,* and *In re Madyun*. In each of these instances, court proceedings were initiated by the reports of physicians who believed that the women were putting their fetuses at risks due to the choices they were making. The choice in *Kruzicki*, however, did not involve

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[64] *Id.* (citing Roe v. Wade, 410 U.S. 113, 162-63 (1973)).

[65] *Id.* at 899 (emphasis added).

[66] *Id.* at 900. "For the purposes of this proceeding, therefore, the fetus can be regarded as a human being, to whom the court stands in *parens patriae*, and to whom the court has an obligation to protect." *Id.* at 899.

[67] *Id.* at 900; *see also* Pemberton v. Tallahassee Memorial Regional Medical Center, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999).

[68] In re Jamaica Hospital, 491 N.Y.S. 2d 898, 900 (N.Y. Sup. Ct 1985).

[69] 541 N.W.2d 482 (Wis. Ct. App. 1995), *overruled by* Wisconsin *ex rel.* Angela v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (on statutory grounds). Several law review commentators have written specifically about the *Kruzicki* case, *see e.g.*, De Ville & Kopelman, *Right Goal, Wrong Remedy, supra* note 40; Carol Gosain, Casenote, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on Wisconsin ex rel. Angela v. Kruzicki*, 5 GEO. MASON L. REV. 799 (1997).

[70] *Kruzicki*, 561 N.W.2d 729; *see, e.g.*, WIS. STAT. ANN. §§ 48.19(1)(c), 48.13(10).

a refusal to consent to a surgery necessary to preserve the life of her fetus; rather, Kruzicki's physician found that she tested positive for cocaine.[71] Her physician reported the positive findings to the County Department of Health and Human Services. The Department petitioned the juvenile court and requested an order to remove "the above-named unborn child from his or her present custody, and [to] plac[e] the unborn child in protective custody," because the fetus was a "child in need of protection or services" under the state's child welfare statutes.[72] The petition was supported by an affidavit of the pregnant woman's physician, who stated that "without intervention forcing [the pregnant woman] to cease her drug use," her fetus would suffer serious physical harm.[73] The juvenile court issued the requested order stating that, "the unborn child . . . be detained . . . by the Waukesha County Sheriff's Department and transported to Waukesha Hospital for inpatient treatment and protection. Such detention will by necessity result in the detention of the unborn child's mother."[74] This order was upheld by the Wisconsin Court of Appeals. The Court of Appeals held that a viable fetus is a "child" within the meaning of the child welfare statute, and that the application of the statute did not violate the pregnant woman's substantive due process rights because the statute was narrowly tailored to vindicate the state's compelling interest in the health, safety, and welfare of a viable fetus.[75] However, the juvenile court's order was overturned by the Wisconsin Supreme Court on statutory grounds.[76]

Unlike the courts below, the Wisconsin Supreme Court held that the statute used to detain the pregnant woman did not give the court jurisdiction over the viable fetus or its mother.[77] As a result, the Wisconsin high court did not reach the federal constitutional substantive due process issues raised by the state's detention of the defendant. The court stated: "Because we conclude that the legislature did not intend to equate a fetus

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[71] *Kruzicki*, 541 N.W. 2d at 485.

[72] *Kruzicki*, 561 N.W.2d at 732.

[73] *Id.*

[74] *Id.* (interpreting § 48 of the Wisconsin Statute, the juvenile court order was later revised on appeal to reflect the supreme court's decision that a fetus is not a "child" within the meaning of the state's child welfare statute).

[75] *Kruzicki*, 541 N.W. 2d at 493.

[76] *Kruzicki*, 561 N.W. 2d at 729.

[77] *Id.*

with a child, we do not reach the question answered by the court of appeals."[78] Ultimately, the Wisconsin legislature amended the statute to clearly include viable fetuses in its definition of "child" under the Children in Need of Protective Services ("CHIPS") statute,[79] thereby allowing for pregnant women to be detained in the name of fetal health in future cases.

C. Civil Commitment Statutes as a Tool of Compliance

An increasing number of state legislatures have amended their civil commitment statutes to permit the detention of pregnant women who abuse drugs or alcohol or otherwise are believed to endanger their fetuses. The civil commitment statutes of Wisconsin, South Dakota, and Minnesota are three examples of this approach.

1. Wisconsin's Legislative Response to Angela M.W. v. Kruzicki

As noted above, the Wisconsin statute promulgated in 1997 in response to the state supreme court's holding in *State of Wisconsin ex rel Angela M.W. v. Kruzicki* was the first state statute permitting the civil commitment of a pregnant woman for the sake of the health of her fetus. The asserted purpose of the statute is

> [t]o recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcoholic beverages, controlled substances, or controlled substance analogs . . . .[80]

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[78] *Id.* at 739.

[79] WIS. STAT. ANN. §§ 48.01- 48.998 (West 2006). The Court of Appeals of Oregon has interpreted its civil commitment statute to allow for the commitment of pregnant women whose behavior poses specific threats to their fetuses. *See* Oregon v. Ayala, 991 P.2d 1100, 1103-04 (Or. Ct. App. 1999). Although the court held that the commitment order was premised on the pregnant woman's inability to care for her gestational diabetes and thereby harming her fetus was void as not based on clear and convincing evidence, the court seems to assume that had such evidence been part of the record, the commitment of Ms. Ayala for not complying with her physician's instructions during her pregnancy could legally or constitutionally result in her commitment under the state civil commitment statute. *Id.*

[80] WIS. STAT. ANN. §§ 48.01 (1) (am), 48.133 (2005).

The legislature's objective thus elevates the purported needs of the fetus over the needs and decisional autonomy of the pregnant woman. Consequently, the statute allows the state to intervene in any woman's pregnancy in order to protect the fetus from any potentially serious harm that could be caused by habitual maternal ingestion of drugs or alcohol.[81]

In addition to the arguably unconstitutional restriction of pregnant women's liberty, the statute suffers from numerous other flaws. For example, the statute allows police officers to "take a pregnant woman into custody if he or she believes that the woman's use of alcohol is posing a substantial risk to the physical health of the child."[82] Any determination that a woman had violated the statute would necessarily be speculative since scientific research in this area is inconclusive; not all pregnant mothers who drink alcohol or consume illicit drugs will bear children with injuries.[83] Nor are those who are injured by their mother's prenatal alcohol or drug use injured in the same manner or to the same extent.[84] As a result, any commitment made pursuant to the statute is based not on the ordinary standard of clear and convincing evidence of harm, but rather on inconclusive scientific research and often speculative beliefs regarding harm to the fetus.[85] Moreover, because the statute protects an "unborn

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[81] WIS. STAT. ANN. § 48.02(1)(am) (2005). "Serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." *Id.* Kenneth DeVille and Loretta Kopelman have written an interesting analysis of the Wisconsin statute and how the use of "expectant mother" and "unborn child" instead of "pregnant woman" and "fetus" in the statutory language blur any differences between children and fetuses and refuse to see a woman as an individual possessed of rights. DeVille & Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 334. The language also "reflect[s] the underlying ideology that inspired the law and ha[s] a practical impact on how the policy is implemented." *Id.* at 334.

[82] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 1048 (summarizing WIS. STAT. ANN. § 48.193(1)(d)(2) (2005)).

[83] *See, e.g.*, Nancy L. Day & Gale A. Richardson, *supra* note 40 (comparing effects of in-pregnancy alcohol, marijuana, cocaine and crack, tobacco, and other drug use on children; effects of alcohol use are highly predictable; research on the effects of other drugs varies and is inconclusive).

[84] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 305; De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 335-36 & nn.44-55; *see e.g.*, D.R. Neuspiel, *Cocaine and the Fetus: Mythology of Severe Risk*, 15 NEUROTOXICOLOGY AND TERATOLOGY 305-06 (1993); GOMEZ, *supra* note 6, at 89.

[85] De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 336. Therefore, as De Ville and Kopelman note, "it may be difficult, if not impossible to establish

child," defined therein as a "human being from the time of fertilization to the time of birth," all pregnant women would be subject to the statute regardless of fetal viability.[86] Accordingly, the statute may force any pregnant woman, at any stage of pregnancy, to choose between civil commitment and abortion in some circumstances. Compounding the problematic nature of the statute on its face, is the fact that the statute went into effect without any interpretive guidelines.[87] This lack of guidelines works to deny both law enforcement and the court any assistance as to how they might enforce the statute without running afoul of these difficulties.

Given the inconclusive scientific research, courts may be basing their determination of fetal harm on something even more problematic: their perception of the proper behavior of pregnant women.[88] Hence any pregnant woman who does not comply with her physician's instructions or the court's expectations regarding appropriate behavior may be subject to the Wisconsin child abuse and neglect statute and may be confined or committed for the duration of her pregnancy.[89] If her child is born with injuries sustained in utero because of alcohol or drug use, the mother may also be subject to criminal child abuse and neglect prosecution, furthering the coercive character of the Wisconsin statutory system and directly implicating women's right to reproductive freedom.[90]

The Wisconsin legislation goes further than empowering physicians to report pregnant women who use drugs or alcohol to state authorities. The statute empowers physicians and other health care providers, including social workers and counselors, to report a pregnant woman to authorities if

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a clearly defined threshold beyond which the risk to the resulting child will justify, as a matter of standing policy, coercive intervention or criminal prosecution." *Id.* at 336. Furthermore, De Ville and Kopelman argue that the "scientific evidence is sufficient to counsel women against substance use and abuse and to provide treatment services to those women who want to forgo those substances during their pregnancies. But given the current levels of knowledge regarding substance abuse and fetal harm, the risk of fetal injury will rarely be sufficient to meet the clear and convincing evidence standard that is required when the state wishes to deprive an individual of his/her liberty." *Id.* at 336.

[86] WIS. STAT. ANN. § 48.02 (19) (West 2005).

[87] *Id.*

[88] *See* April L. Cherry, *Nurturing in the Service of White Culture*, 10 TEX. J. OF WOMEN & L. 83, 116 (2001).

[89] *See also* De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 337.

[90] *See* WIS. STAT. § 940.06 (2006).

he "suspects" that the health of the fetus will be compromised by the pregnant woman's drug or alcohol use. Section 146.0255(2) of the Wisconsin Statutes states:

> Any hospital employee who provides health care, social worker or intake worker under chapter 48 may refer an infant or an expectant mother of an unborn child . . . to a physician for testing of the bodily fluids of the infant or expectant mother for controlled substances or controlled substance analogs if the hospital employee . . . *suspects* that the infant or expectant mother has controlled substances or controlled substance analogs in the bodily fluids of the infant or expectant mother because of the use of controlled substances or controlled substance analogs by the mother while she was pregnant with the infant or by the expectant mother while she is pregnant with the unborn child. . . . If the results of the test indicate that the infant does have controlled substances or controlled substance analogs in the infant's bodily fluids, the physician shall make a report . . . . If the results of the test indicate that the expectant mother does have controlled substances or controlled substance analogs in the expectant mother's bodily fluids, the physician may make a report.[91]

Because the statute allows reporting by a large class of people, more women are likely to be turned over to the authorities and, as a result, confined under the statute.

Moreover, the Wisconsin legislation has far reaching implications concerning the abortion rights and other civil rights of pregnant women. Attorney and scholar Lynn Paltrow argues:

> The revised Wisconsin code also permits counties to appoint juvenile court commissioners to oversee cases and conduct hearing applicable to unborn children, but only allows lawyers with "a demonstrated interest in the welfare of . . . unborn children" to be eligible for appointment to such positions. . . . Because unborn children are defined to exist from the moment of fertilization, a guardian could be appointed even for pre-embryos. . . . Consequently, if a woman decided to have an abortion during the pendency of her case, the guardian would undoubtedly be expected to oppose it in the "best interests" of the "unborn child."

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[91] WIS. STAT. § 146.0255(2) (2006) (emphasis added).

> Guardians are also required to "assess the appropriateness and safety of the environment of the . . . "unborn child." The pregnant woman is thus reduced, by statutory terms to an "environment" for a fetus, or in other words, a fetal container.[92]

Finally, the Wisconsin statute requires in some instances and allows in others for physicians and other health care professions to disclose confidential information about the pregnant woman without her consent when "the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion . . . that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother . . . in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree."[93] While the Wisconsin statute is flawed for all of the reasons discussed above, an additional flaw concerns the harm the statute will cause to fetuses. In fact, it may harm more fetuses than it helps because pregnant women who would benefit from drug and alcohol counseling and services will be reluctant to seek prenatal care because of their fears of being turned over to state authorities.

2. Legislative Activity in South Dakota and Minnesota Permitting Civil Commitment of Pregnant Women Who Use Alcohol or Illicit Drugs

In 1998, the South Dakota legislature enacted a statute that permits the involuntary emergency civil commitment of pregnant women who

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[92] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 1047 (citations omitted). As New York Times columnist Bob Herbert has noted: "The passage of laws purporting to protect fetuses by declaring them 'persons' is an accelerating national trend . . . in the long run, that would undermine a woman's right to have an abortion." Herbert, *supra* note 21, *available at* 1998 WLNR 3044594 at *1. Paltrow's concerns are not unfounded. Indeed, in at least one other state, Alabama, some judges have begun to appoint guardians for fetuses in cases involving judicial by-pass hearings for minors seeking abortions, thereby severely limiting minors' access to abortion in that state. *See, e.g.*, *In re* Anonymous, 720 So. 2d 497 (Ala. Civ. App. 1998); *In re* Anonymous, 733 So. 2d 429 (Ala. Civ. App. 1999); *see also* Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69 (2001) (arguing that such appointments are likely to meet the "undue burden" standard, but that the standard itself has become "undue" in states that recognize a strong interest in the unborn fetuses).

[93] WIS. STAT. § 905.04(4)(e)(3) (2006); *see also* WIS. STAT. § 905.04(4)(f) (2006) (allowing testing to be performed without consent of the pregnant woman).

abuse alcohol or drugs.[94] The statute states that "[a]n intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs may be committed to an approved treatment facility for emergency treatment."[95] The statute further provides that the court can place a pregnant woman in state custody for the duration of her pregnancy if she is found to be abusing alcohol or drugs.[96] However, the statute fails to guide law enforcement officials or the judiciary in defining "abusing alcohol or drugs."[97] Hence every law enforcement officer and judge is left to determine, without any legislative guidance, how much of an illicit drug or alcohol is too much.[98]

In 1997, Minnesota enacted a similar statute permitting the involuntary civil commitment of pregnant women who were dependent on illegal drugs including cocaine, heroin, phencyclidine, methamphetamine, or amphetamines, and whose "habitual and excessive use" endangered her fetus.[99] Interestingly, the Minnesota statute does not include the use of alcohol or marijuana, even though alcohol's tertagenic effects are well known and marijuana use is illegal.[100] The Minnesota statute mandates that health care providers report to state agencies or authorities if they "know[] or ha[ve] reason to believe that a woman is pregnant and has used a controlled substance for a non-medical purpose during the pregnancy."[101] Anyone else may also report a pregnant woman to state authorities for the same reasons.[102] After someone makes a report, the local welfare agency

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[94] S.D. CODIFIED LAWS § 34- 20A-63(3) (1998).

[95] S.D. CODIFIED LAWS § 34-20A-63 (1998) (referring to emergency commitment—the statute does not discuss non-emergency commitment.).

[96] S.D. CODIFIED LAWS § 34-20A-63 to – 70 (1998).

[97] *Id.*

[98] S.D. CODIFIED LAWS § 34-20A-63 (1998); *see also* Paltrow, *Pregnant Users*, *supra* note 44, at 1049.

[99] MINN. STAT. ANN. § 253B.02 (2005).

[100] SCHROEDEL, *supra* note 22, at 178.

[101] MINN. STAT. ANN. § 626.5561, subdiv. 1 (West. Supp. 1999).

[102] *Id.*

must "conduct an appropriate assessment and offer services indicated under the circumstances."[103]

Interestingly, nothing in the Minnesota statute mandates that these involuntarily confined women undergo drug treatment. The Center for Policy Research notes that at least one pregnant woman who was involuntarily committed under the statute was committed to a locked ward for people with eating disorders for several months where she received no treatment for her drug addiction.[104] In addition, the statute empowers the local welfare agency to seek an emergency confinement of the pregnant woman if she refuses the "recommended voluntary services or fails recommended treatment."[105] By assessing confinement as a penalty for non-compliance with "recommended" treatment, the legislature seems to miscomprehend the very nature of a "recommendation." Thus, the services under this model are neither recommended nor voluntary.

Rather, under this legislative model, services are mandatory if the pregnant woman wishes to avoid confinement. Ultimately, through the statute, the legislature has given physicians' recommendations the power of law.[106] The legislature has obliterated the power of pregnant women to give informed consent, even though informed consent is understood as an important democratic good. Informed consent helps protect patients' autonomy by shielding them from the undue influence of their physician's personal values and preferences regarding treatment.[107] The statute's resulting system works to deny these pregnant women basic rights to autonomy, including the right to refuse medical treatment—a basic human right and constitutional liberty.[108]

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[103] MINN. STAT. ANN. § 626.5561, subdiv. 2 ("Services offered may include, but are not limited to, a referral for chemical dependency assessment, a referral for chemical dependency treatment if recommended, and a referral for prenatal care.").

[104] SCHROEDEL, *supra* note 22, at 178.

[105] MINN. STAT. ANN. § 626.5561, subdiv. 2.

[106] Similarly, in compelled medical treatment cases, judges give doctors' recommendations the power of law and thereby destroy the foundation of informed consent. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 590.

[107] *See* J. Steven Svoboda et. al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61, 71-72 (2000).

[108] *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 589-93; April L. Cherry, *Roe's Legacy: The Non-Consensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. Pa. J. Const. L. 723, 736 (2004) [hereinafter Cherry, *Roe's Legacy*]. As of 2002, fewer than 100 women have been involuntarily

Rebecca Corneau's situation resembled Jessie Mae Jefferson's and Angela M.W.'s. By refusing to comply with physician orders, Corneau found herself detained in a state hospital. Corneau came to the attention of the Commonwealth of Massachusetts as a member of the Attleboro-Robidoux Sect, a fundamentalist Christian group which, like the better-known and larger sect of Christian Scientists, rejects medical treatment.[109] The state believed that Corneau's rejection of medical treatment led to the death of her newborn son, Jeremiah, in 1999.[110] State officials asserted that Jeremiah died because Corneau or other sect members who attended his birth failed to aspirate his lungs after birth. Corneau refuted this claim and insisted that Jeremiah was stillborn.[111] Local authorities were also concerned because they believed that another infant child in the sect died during the same year as a consequence of being denied food. Eight members of the sect were jailed for failing to cooperate in the state's investigations into the two children's deaths. The state adjudicated Corneau an unfit parent of her three living children and removed them from her home.[112] Notably, the state chose not to charge Corneau with any crime relating to the death of Jeremiah or the other sect infant despite removing her children. Nevertheless, when Corneau became pregnant in 2000, the court ordered her to undergo a physical examination. Because her religion prohibits medical treatment, Corneau refused to comply.[113] Consequently, Corneau was held in contempt of court and the court ordered her to be detained at a state-run medical facility for pregnant prison inmates. The court stated that it feared for the health of the fetus if Corneau gave birth

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committed to residential drug treatment facilities under this statute. SCHROEDEL, *supra* note 22, at 178. Political scientist Jean Reith Schroedel reports that the average stay is less than one month. *Id.* (citing Judy Pasternak, *Wisconsin Oks Civil Detention for Fetal Abuse*, LA TIMES, May 2, 1998, at A1).

[109] Robin Power Morris, *The Corneau Case, Futhering Trends of Fetal Rights and Religious Freedom*, 28 N.E.J. ON CRIM. & CIV. CON. 89, 92 (2002). For a fuller discussion of the *Corneau* case, see Hedy Bower, *How Far Can a State Go to Protect a Fetus? The Rebecca Corneau Story*, 31 GOLDEN GATE U.L. REV. 123, 123 (2001).

[110] Bower, *How Far can a State Go*, *supra* note 109, at 124.

[111] *Id.* at 123-24.

[112] Dave Wedge, *Hearing Slated on Cult Baby's Future*, BOSTON HERALD, Oct. 18, 2000, at 18.

[113] Dave Wedge, *Defiant Mom—Pregnant Cultist Refuses Medical Assistance*, BOSTON HERALD, Aug. 31, 2000, at 1.

without medical assistance.[114] The judge in the case reportedly stated to the courtroom that the fetus had told him that it did not want to die.[115]

D. The Incarceration of Drug Dependent Pregnant Women to Protect Fetal Health

Incarceration is the third and perhaps most egregious mechanism by which states have sought to protect fetal health from the imprudent behavior of non-compliant pregnant women. *United States v. Vaughn*[116] may be the first publicized case of a sentencing judge incarcerating a pregnant defendant solely to protect the health of her fetus. Brenda Vaughn was a first time offender who pled guilty to second-degree theft—a misdemeanor—for forging $700 worth of checks.[117] Although the crime was punishable by a fine of up to $1000 and one year in jail, the sentencing judge noted that "most judges of this court would probably impose a sentence of probation for most defendants with a first-time misdemeanor conviction."[118] Nevertheless, after determining that Vaughn tested positive

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[114] Dave Wedge, *Judge Confines Cult Mom to Secure Hospital; Judge's Ruling Locks up Defiant Pregnant Cult Mom*, BOSTON HERALD, Sept. 1, 2000, at 1; *see also* Morris, *The Corneau Case*, *supra* note 109, at 94.

[115] Mac Daniel, *Judge Keeps Mother Confined Says Fetus Told Him "I Do Not Want to Die,"* BOSTON GLOBE, Sept. 8, 2000, at B6.

[116] *U.S. v. Vaughn*, DAILY WASH. LAW REP., March 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988) (Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988); *see* Richard Cohen, *When a Fetus Has More Rights than the Mother*, WASH. POST, July 28, 1988, at A21; Isabelle Katz Pinzler, *Jailed Because She is Pregnant: A Superior Court Judge Went Beyond His Duty*, WASH. POST, Aug. 21, 1988, at C8. *See also* Becker, *supra* note 25, at 237 (discussing the Vaughn case and noting that judges in other jurisdictions "also use the sentencing phase of a trial to punish drug use during pregnancy"); *Id.* at 237-38 (noting that Indian tribal judges also use incarceration as a tool of fetal protection when dealing with Native American women who live on reservations and drink alcohol while pregnant); Barrie L. Becker & Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties*, 2 S. CAL. REV. L. & WOMEN'S STUD. 527, 530 (1993) (noting that, in a survey of judges at a course on alcohol and drugs and the courts at the National Judicial College, all of the judges, save one, responded that they would immediately remand the defendant into custody when asked what they would do if a pregnant, long-time heroin user who tested positive for heroin came before them for a probation violation on a drug case).

[117] *U.S. v. Vaughn*, *supra* note 116, at 441.

[118] *Id.* at 447.

for cocaine and was six months pregnant, the same Judge sentenced Vaughn to six months incarceration.[119] He stated that he wanted "to be sure she would not be released until her pregnancy was concluded . . . because of concern for the unborn child."[120] The presiding judge believed that Ms. Vaughn would not have access to illicit drugs in jail and that, as a result, the fetus would suffer less harm. Moreover, the judge declared that such a sentence was also in the best interest of "the taxpaying public who would undoubtedly have to pay for . . . a child who could have severe and expensive problems at birth."[121]

Incarceration of pregnant women for the perceived benefit of the fetus continues to occur in trial courts.[122] *New Jersey v. Ikerd*[123] is one recent example. Although the appellate court later overturned the decision, *Ikerd* demonstrates the workings of trial courts, which, because much of their work is unreported, are often shielded from public scrutiny and legal academic analysis. Like in *Vaughn*, the court revoked the probation of a drug addicted pregnant woman in *Ikerd*.[124] Ikerd pled guilty to a third-degree felony and was sentenced to five years probation. When she violated her probation, she was eight weeks pregnant and addicted to drugs. At sentencing, she was eleven weeks pregnant and sentenced to prison for the duration of her pregnancy. The judge stated that he sentenced her to prison for the duration of her pregnancy, "[n]ot because we want to punish her, but because we want to save the baby."[125] The trial transcripts further indicate that the sole purpose of Ikerd's incarceration was to protect the health of her

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[119] *Id.* at 441.

[120] *Id.*; *see also* Rorie Surman, *Keeping Baby Safe From Mom,* NAT'L L.J., Oct. 3, 1988, at 1, col. 1.

[121] *U.S. v. Vaughn*, *supra* note 116, at 441; *see also* STEINBOCK, *supra* note 34, at 140.

[122] Another example of how the court uses threats of incarceration to control the behavior of pregnant women can be found in the Second Judicial District of New Mexico in Albuquerque. Under a court program, drug-using pregnant women who are arrested for non-violent crimes can avoid prosecution by participating in a drug treatment and prenatal care program coordinated by the court. For more detail, see GOMEZ, *supra* note 6, at 81.

[123] 850 A.2d 516 (N.J. Super. Ct. App. Div. 2004).

[124] *Id.*

[125] *Id.* at 519. Moreover, the sentencing judge discussed the possibility of confining Ikerd to a hospital for the duration of her pregnancy, but found that option unacceptable because of its cost to taxpayers. *Id.*

fetus. For example, the judge indicated that he would reconsider the sentence when the baby was born or if Ikerd terminated her pregnancy.[126] In addition, the trial judge told the defendant's attorney, "if she loses the baby, if there is a problem, and she has the baby, I'll consider . . . any application that you wish to make at that time."[127]

Ikerd appealed her sentence on the grounds that her incarceration was unlawful because it conflicted with both the sentencing statute and constitutional guarantees.[128] The appellate court rightly held that the defendant had been incarcerated because she was a pregnant addict, not because of the crime to which she had pled guilty; as such, her sentence was unlawful. The appellate court stated:

> The transcript of the February hearing clearly discloses that the only reason that the judge sent Ikerd to prison was to protect the health of her fetus, a consideration wholly unrelated to Ikerd's underlying crime of welfare fraud. That the court was willing to reconsider its sentence if Ikerd's pregnancy terminated constitutes disturbing but compelling proof of this proposition. *Ikerd was punished by being subject to the extended prison term because she was pregnant and addicted, and for no other reason.*[129]

The appellate court noted that the sentencing judge's decision in this case implicated such constitutional issues as the protection against cruel and unusual punishment, protection of the right to privacy, including the right to procreation, and the due process and equal protection guarantees. Yet, the appellate court did not base its decision on constitutional grounds. Instead, it overturned Ikerd's sentence as a violation of state sentencing law and a violation of the principles of separation of powers,[130] holding that the sentencing judge had in effect "usurped the powers of the legislature."[131] In

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[126] *Id.* at 520.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 522 (emphasis added).

[130] *Id.* at 523 (violates the statute which states that "no conduct constitutes an offense unless the offense is defined by this code or another statute of this State") (citing State v. Stewart, 642 A.2d 942 (N.J. 1994); State v. Cannon, 608 A.2d 341 (N.J. 1992)).

[131] *Id.* at 523.

sum, the appellate court held that incarceration of a pregnant criminal defendant for the sole purpose of protecting her fetus was impermissible under the applicable state statutes, but only hinted that it may also violate a number of constitutional principles.

In all of the cases discussed thus far, the pregnant women involved behaved in "unauthorized" ways by either refusing to consent to medical procedures recommended by physicians or by behaving in ways viewed as at odds with the delivery of a healthy infant. Because they refused to conform to mothering norms, they were subjected to censure and state control without any regard for their own constitutional rights to privacy, bodily integrity, and freedom from unwarranted detention and confinement.

II. FREEDOM FROM UNWARRANTED DETENTION AND THE RIGHT TO PRIVACY

The rights guaranteed by the Constitution protect the individual from state intervention or coercion in a limited number of circumstances.[132] They are thought to be necessary to preserve individual liberty, a prerequisite for democratic citizenship.[133] Such is the conventional understanding of both the right to be free from detention or incarceration without due process of law and the right to privacy related to reproductive decisions. When the state detains pregnant women, not for the protection of themselves but rather for the ostensible protection of their fetuses, the state coerces those women to behave in ways that it believes would be beneficial for their fetuses. This coercion represents a violation of two of the most basic constitutional rights—the right to be free from unwarranted detention and the right to privacy.

A. Freedom From Unwarranted Detention, Confinement and Incarceration: The Right to be Free From Physical Restraint

Both the Fifth and the Fourteenth Amendments maintain that the state cannot deprive a citizen of liberty without due process of law. In its simplest form, liberty in this context means freedom from incarceration or detention by the state, or, in other words, "freedom from bodily

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[132] BREYER, *supra* note 7.

[133] *Id.*

restraint."[134] This right of physical liberty—the right to be free from physical restraint—is a fundamental right, and, as such, any restriction of this right is subject to strict scrutiny. In order to restrict a citizen's physical liberty, the state must show that such a restriction is the result of a compelling state interest and that the restriction is the least restrictive means of, or necessary for, protecting that state interest.[135]

Recognition of the right to physical liberty permeates both the criminal and civil law as demonstrated in the context of the use of preventative detention by states to detain criminal defendants. Under the doctrine of preventative detention, the state may hold or confine a criminal defendant prior to trial without bail if it fears that the defendant is dangerous to others.[136] The state must articulate a compelling interest and must show that no lesser restrictive alternatives are available or feasible. In the preventative detention context, the protection of third parties is the articulated compelling state interest. As the Court held in *United States v. Salerno*, the government must present "an identified and articulable threat to an individual or the community" for the detention to pass constitutional muster.[137] The state must also support its conclusion that the detention is necessary for the protection of the third party by clear and convincing evidence.[138] Furthermore, "the judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the sustainability of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release."[139]

Most of the pregnant women in the foregoing cases were not criminal defendants. Therefore, preventative detention was inappropriate. When the pregnant woman is a criminal defendant, preventative detention is

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[134] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[135] *See, e.g.*, City of Bourne v. Flores, 521 U.S. 507, 515-16 (1997) (holding that when infringing upon a fundamental right, state has the burden of proving that the state action is necessary to further a compelling state interest and that the action chosen represents the least restrictive means of furthering the state interest).

[136] 75 A.L.R.3d 956.

[137] U.S. v. Salerno, 481 U.S. 739, 751 (1987).

[138] *Id.* at 742-43.

[139] *Id.*

only appropriate if she poses a danger to a third party. Because the fetus is not a legal person,[140] there is no support for considering the fetus a third party, even if the fetus is viable. When the pregnant woman is convicted of a crime and probation is ordered, to be constitutional the probation conditions must relate either to her criminal conviction or to her future criminality.[141] If the state subjects a pregnant woman to conditions of probation that bears no relationship to her convictions, then the conditions are invalid and unconstitutional.[142]

However, possibly with the hope of avoiding the issues related to criminal detention, some courts have confined and detained pregnant women for the preservation of fetal health through civil proceedings. Nevertheless, because freedom from physical restraint is a fundamental right, these civil courts must still overcome the highest of standards in order to justify these restrictions.

In *Addington v. Texas*, the Supreme Court articulated this strict standard, holding that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[143] As other commentators have noted, the state's interest in an individual's civil commitment can be justified by two traditional state powers: the police power and the *parens patriae* power.[144] The police power permits the state to act to protect the community from a dangerous person, while the *parens patriae* power permits the state to act to protect the individual from him or herself. Both powers are limited. For example, in terms of civil commitment, the police power cannot be used to protect the community from *all* dangers. The *parens patriae* power is similarly restricted. It cannot be used to protect the individual from all of his or her improvident acts. In fact, *parens patriae* is traditionally used to protect children and only those adults with mental disease or defects. When either state power is

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[140] Roe v. Wade, 410 U.S. 113, 158 (1973) ("The word 'person' as used in the Fourteenth Amendment, does not include the unborn."). Also, born alive rules in criminal and tort law require a live birth to support any claims on behalf of the child for injuries incurred in utero. *See, e.g.*, Ryan v. Brown, 827 N.E.2d 112 (Ind. Ct. App. 2005) (claim under Indiana Medical Malpractice Act was subject to summary judgment when the child was not born alive, therefore barring the claim).

[141] Becker & Hora, *supra* note 116, at 531; *see generally*, 21A AM. JUR. 2D *Criminal Law* § 907.

[142] Becker & Hora, *supra* note 116, at 532.

[143] 441 U.S. 418, 432 (1979).

[144] *See, e.g.*, Gosain, *supra* note 69, at 828.

implicated, the individual's physical liberty may be constrained, but only if due process requirements have been met: the state must articulate a compelling state interest and demonstrate that the detention is necessary for the protection of that interest and that no less restrictive means exists to protect that interest.

Like the commitment of the mentally ill, the detention of pregnant women who use drugs or alcohol or who are otherwise non-compliant or unconventional in the care of their fetus interferes with physical liberty. As such, the detention must be subjected to strict scrutiny. In this context, the state articulates a compelling interest based on both of the traditional rationales: the *parens patriae* power to protect a pregnant woman from her own behavior and the police power to protect third parties from the pregnant woman's actions. In these cases, the court considers the fetus to be the third party in need of protection. Thus, in order for a civil detention or commitment to pass strict constitutional scrutiny, the state must show, by clear and convincing evidence,[145] that the pregnant woman is either a danger to herself or a danger to the fetus.

To invoke its *parens patriae* power, the state must show something more than that the woman is a danger to herself. The state must show that the pregnant woman falls into the category of persons protected under the *parens patriae* rationale. The making of poor choices does not generally constitute mental disease or defect. While the pregnant woman's behavior may be foolish or improvident, failure to abide by physicians' "orders"[146] or continuing to drink alcohol or take illicit drugs arguably does not rise to the level of mental disease and is consequently not subject to protection under the *parens patriae* power.

To invoke the police power, the state must demonstrate a danger to a third party. Thus, the state must show that the fetus constitutes a legally recognized "other" at risk from injury because of the pregnant woman's behavior. While the fetus may be at risk from the pregnant woman's poor or unconventional choices, it cannot constitute a third party. The fetus is not yet a legal person because it has no independent or legal existence outside of its mother.[147] Some commentators argue that because the Court has held

[145] *Addington*, 441 U.S. at 432.

[146] "Orders"—in the context of pregnant women, physician's recommendations are not voluntary in that these detentions show that the pregnant woman must follow them or be subject to censure. They are not recommendations in the sense that the woman, relying on her on judgment, can decide not to abide by them —there is no sense in these determinations that informed consent principles apply.

[147] Roe v. Wade, 410 U.S. 113, 158 (1973).

that the state has a compelling interest in the fetus at viability[148] and that the state has a "legitimate interest" in the fetus from the beginning of the pregnancy,[149] the state may act to protect a viable fetus from the actions of its improvident mother.[150] However, this argument fails to appreciate the limits of the state's power; even when the state's interest in the fetus becomes compelling, the state can only prevent the abortion of the fetus.[151] As such, the state's interest in the fetus is only compelling in the context of abortion. The state cannot detain the pregnant woman to protect the fetus. The state can only prevent the intentional destruction of the fetus; it cannot prevent the unintended consequences of the pregnant woman's poor or unconventional choices. Arguably, the Court has chosen to limit the state's power because of the fundamental, constitutional importance of protecting the woman's bodily integrity from state intrusion. Hence, the state's interest in the fetus, non-viable or viable, is not compelling outside of the abortion context. Therefore, the state cannot justify the detention of the pregnant woman for the benefit of fetal health.[152]

Assuming *arguendo* that the state could demonstrate the requisite compelling interest, it must still establish that the confinement is necessary to protect that interest. If less restrictive alternatives to detention exist, detention becomes unconstitutional. Less restrictive alternatives are in fact available for the protection or preservation of fetal health in the civil context. These include, but are not limited to, state-provided drug and alcohol rehabilitation for those who are interested, state-supported prenatal care, and increased state-supported nutrition assistance programs. Indeed, medical professionals assert that greater availability of alcohol and drug treatment for pregnant women and increased access to prenatal care and

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[148] *Id.* at 163-64.

[149] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

[150] *See, e.g.*, Jason M. Steffens, Note, *The "Peculiar" Being: The Rights of an Unborn Child in Iowa,* 88 IOWA L. REV 217, 256 (2002); Jeffrey P. Phelan, *The Maternal Abdominal Wall: A Fortress Against Fetal Health Care?*, 65 S. CAL. L. REV. 461, 479 (1991).

[151] For a further discussion of this issue, see *infra* notes 161-162 and accompanying text.

[152] Interestingly, the state also has an interest in the health of the woman—an interest in her rehabilitation. Such an interest may be enough to compel treatment in the case of drug or alcohol addiction, but the state's interest is not strong enough to compel detention.

good nutrition would lead to better fetal outcomes than any sort of detention.[153]

Because civil detention and commitment restricts an individual's liberty, the state must demonstrate a compelling and necessary interest by clear and convincing evidence and show that no less restrictive alternatives exist before it authorizes detention. In the context of non-compliant and drug and alcohol using pregnant women, the state cannot meet this standard. Therefore, any detention for the sake of fetal health is unconstitutional.

B. Reproductive Rights: The Right to Privacy and Bodily Integrity

Conventionally, the right to privacy is the right to be left alone and to be free from state interference in decisions that pertain to one's self-definition. This notion also posits that privacy is an essential prerequisite to both personhood and citizenship, "encompassing such notions as autonomy, liberty of conscience, self-determination, and individual identity."[154] This understanding of privacy protects the right to be different or, in other words, the right to define our own identities. Jed Rubenfeld appropriately argues that, "In personhood's own view, the right to privacy protects iconoclasm; it allows people to define themselves in defiance of certain widely held, deeply entrenched values."[155] Because the protection of privacy can negatively affect others, Rubenfeld further asserts that this understanding of privacy can "offer[] a balancing test as its governing principle. The test would weigh the importance of certain conduct to an individual's identity against the importance of the state interest being served by the law restricting the conduct."[156] In this view, the state can nevertheless limit or

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[153] *See* American Medical Association Board of Trustees, *supra* note 28; Committee on Substance Abuse, American Academy of Pediatrics, *supra* note 29, at 366 ("[W]hen [anti-drug] education fails, effective drug treatment programs should be made readily available to pregnant women . . . . [The Academy] is concerned that . . . involuntary measures may discourage mothers and their infants from receiving crucial medical care and social support."); American Public Health Association, *supra* note 29 (recommending educational programs, outpatient program referrals, and development of treatment facilities, and rejecting punitive measures).

[154] Linda C. McClain, *The Poverty of Privacy*, 3 COLUM. J. GENDER & L. 119, 124 (1992); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-96 (1978) (discusses rights of privacy in the context of personhood).

[155] Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 759 (1989).

[156] *Id.* at 760.

destroy the freedom to procreate and to avoid procreation, protected by the right of privacy and characterized by the Supreme Court as "one of the basic civil rights of man,"[157] if the state interest is compelling and no lesser restrictive means are available to accomplish the legitimate or compelling aims of the state.[158]

Reproductive rights then, are protected in most instances from state interference and coercion under the doctrine of privacy. Discussing privacy in the context of contraception, Justice Brennan asserted that "[if] the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."[159] Procreation is a fundamental right that the state can only regulate if the state interest in regulation is compelling and no less restrictive means are available. In the arena of reproduction, the Court has only found these factors satisfied in a single context: the abortion of a viable fetus. Although abortion cannot be prohibited by the state unless the fetus is viable, the Court has allowed regulation of abortion so long as the regulation is not unduly burdensome.[160] However, the facts offered in the cases and statutes presented herein (the use of the state's *parens patriae* power, the use of civil commitment statutes, and the incarceration of drug-dependent women) are not analogous to cases involving the abortions of viable fetuses. Neither do they fit into the narrow exception carved out in the Court's privacy jurisprudence allowing state intervention. Hence, in the regulation of pregnant women's behavior, the state must be held to the high standard articulated by the Court in other privacy cases regarding women's reproductive decision making and rights.

Accordingly, the Court's privacy jurisprudence presents a line of argument that contravenes state detention of pregnant women for the sake of fetal health. The Court has proffered two different standards of review

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[157] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that a statute requiring sterilization of some classes of criminals but not others is unconstitutional as discriminatory under the Equal Protection Clause).

[158] *See, e.g.*, Buck v. Bell, 274 U.S. 200, 205-07 (1927) (This case upheld a Virginia statute which permitted the nonconsensual sterilization of a woman deemed "feeble-minded" to prevent the birth of "feeble-minded" children who might lead lives of crime or indigency. The Court writes that "Three generations of imbeciles are enough.").

[159] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[160] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 876-77 (1992).

with respect to reproductive rights: one for contraception issues and another for abortion issues.[161] Although the Court's abortion jurisprudence does not apply to the detention and civil commitment of pregnant women for the sake of fetal health, a close analysis of the undue burden standard used in abortion cases nevertheless demonstrates that such detentions violate pregnant women's rights of privacy. That is, even under the Court's undue burden standard, which allows greater state intervention, the confinement and detention of pregnant women for the benefit of fetal health unduly burdens a pregnant woman's privacy rights, including the right to be free from government intrusion, coercion, or physical restriction on account of pregnancy.

1. The Right to Be Free From Government Coercion in The Context of Reproduction and Reproductive Decision Making: The Court's Contraception Jurisprudence

In *Griswold v. Connecticut*, the Supreme Court held that the United States Constitution protected married couples' use of contraception from state intrusion.[162] Justice Douglas, writing for the majority, held that the right of privacy was a fundamental right implicit in the Bill of Rights, specifically the First, Third, Fourth, Fifth, and Ninth Amendments.[163] Moreover, for Justice Douglas the right of privacy was not primarily about avoiding procreation or making reproductive choices. Rather, the right to privacy reflects the need to protect married couples from state intrusion into

[161] In other contexts, I have made the argument that the proper standard for analyzing cases of reproductive decision making outside of the context of abortion is to understand these decisions simply as medical decision making, protected by the individual's constitutional liberty interest in bodily integrity and in refusing unwanted medical treatment. *See* Cherry, *Roe's Legacy*, *supra* note 108. I continue to believe that this is certainly true in the context of the compelled medical treatment of pregnant women. But some of the aforementioned paradigmatic cases present a slightly different challenge. The criminal detention and civil commitment cases are not only about the protection of reproductive decision making. They are also about the protection of other choices (even though they may not be among the healthiest of choices), and more importantly for this essay, the protection of women from physical coercion of the state for the benefit of another—the fetus.

[162] Griswold v. Connecticut, 381 U.S. 479 (1965).

[163] *Id.* at 484. Fundamental rights are rights that the Court deems to be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed." Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

their "home and . . . privacies of life," and the need to protect them from state coercion.[164] *Eisenstadt v. Baird* extended the right of privacy articulated in *Griswold* to protect unmarried adults' contraceptive use.[165] In *Eisenstadt*, the Court clearly recognized the individual's right to purchase and use contraception, thereby recognizing his or her right to make decisions concerning procreation.[166]

At the very least, *Griswold* and *Eisenstadt* articulate a constitutional right to engage in reproductive decision making. Detention, confinement, and threats thereof for the benefit of the fetus may discourage women from procreating or encourage some women to abort their fetuses to avoid incarceration. As such, these state actions violate pregnant women's right to privacy under the rubric articulated in *Griswold* and *Eisenstadt* and are therefore unconstitutional. These Supreme Court cases also reiterate a theme in constitutional jurisprudence affirming the inappropriateness of state coercion in individual decision making.[167] Under either understanding of these cases, judicial or legislative coercion, particularly in the form of detention or commitment, is inappropriate and unconstitutional.

2. Casey v. Population Services*: The Right to be Free from Unduly Burdensome Government Regulation of Abortion*

The privacy principle articulated in *Griswold* and *Eisenstadt* was further extended to include a woman's right to abort a non-viable fetus. In *Roe v. Wade*, the Supreme Court held that state interference with women's decision making regarding abortion of a non-viable fetus was invalid.[168] The Court reasoned that because abortion of a non-viable fetus was indeed a fundamental right, any state regulation restricting abortion had to pass strict scrutiny.[169] Since the state's interest in the fetus did not become

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[164] *Griswold*, 381 U.S. at 484 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

[165] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[166] *Id.* at 453.

[167] BREYER, *supra* note 7, at 5; *c.f.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1989) (holding that only state action that coerces individual to act contrary to her religious beliefs is constitutionally impermissible under free exercise clause).

[168] Roe v. Wade, 410 U.S. 113 (1973).

[169] *Id.* at 152-53.

"compelling" until viability, any state action restricting abortion before fetal viability was deemed presumptively invalid.[170]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court abandoned this presumption.[171] The *Casey* Court articulated a new standard. It held that a regulation will fail to meet a constitutional challenge only if it places a substantial burden on a woman's right to have an abortion. If the reviewing court does not deem the regulation to place a substantial or undue burden on the woman seeking to access abortion services, it must then assess the constitutional validity of the regulation with a rational relationship review to determine whether the state's regulation is rationally related to the state's legitimate interest in preserving potential life.[172] In *Casey*, abortion clinics and physicians challenged, on substantive due process grounds, the constitutionality of a Pennsylvania abortion statute.[173]

Although the Court's commitment to stare decisis led it to continue to identify abortion as a "fundamental right,"[174] the Court in *Casey* nevertheless destroyed many of the safeguards protecting women's right to abortion that it had previously required under *Roe*.[175] The Court found that the trimester framework developed in *Roe* "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest

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[170] *Id.* at 162-63.

[171] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

[172] Justice O'Connor first suggested this standard in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 453 (1983) [hereinafter Akron I] (O'Connor, J., dissenting); *see also* O'Connor's opinions in Hodgson v. Minnesota, 497 U.S. 417 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) [hereinafter Akron II]; Webster v. Reprod. Health Services, 492 U.S. 490 (1989). In *Akron I*, Justice O'Connor stated that a statute imposes an undue burden only if it imposes absolute obstacles or severe limitations. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). She has since moderated her position. *See Casey*, 505 U.S. at 988-89.

[173] *Casey*, 505 U.S. 833. The statute included the following provisions: a mandatory twenty-four hour waiting period; an informed consent provision; a requirement for a physician-delivered, government-directed litany of information, including the availability of additional information providing in great detail the fetus' development, the possibility of state-funded prenatal care, and the liability of the man who impregnated the woman for child support; parental consent for minors; a reporting requirement mandating that information about each abortion be reported to the state; and a spousal notification provision. *See* 18 PA. CONS. STAT. ANN. § 3205 (1990). *See also Casey*, 505 U.S. 833.

[174] *Casey*, 505 U.S. at 833.

[175] *Id.* at 872.

in potential life."[176] Accordingly, the *Casey* Court rejected the application of strict scrutiny, the standard traditionally used to evaluate the constitutionality of abortion regulations. Instead, the Court adopted the undue burden test, an intermediate form of review. Under this intermediate form of review, the Court questions only whether the state regulation at issue has the purpose or effect of placing a substantial obstacle in the path of a woman seeking the abortion of a non-viable fetus.[177] As the court stated, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[178] As *Casey* and later lower court decisions would demonstrate, the category of regulations and restrictions that are unduly burdensome is rather small. Only those regulations that have "a 'severe' or 'drastic' impact on the availability of legal abortion or absolutely vetoes a woman's choice" will be found unconstitutional.[179]

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[176] *Id.*

[177] Martha Field has argued that the "establishment of this new constitutional framework with which to evaluate the constitutionality of abortion regulation" is probably the most significant holding of Casey. Martha Field, *Abortion Law Today,* 14 J. LEGAL MED. 3, 12-13 (1993).

As I, and others, have previously noted, the "unduly burdensome" standard of the Court seems to be more conclusory than a clearly articulated analytical framework. *See, e.g.*, April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion*, *supra* note 8, at 223; *see also* Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 608 (1994).

Moreover, in their 1991 article, *Mediating the Polar Extremes: A Guide to Post-Webster Policy*, Richard Wilkins, Richard Sherlock, and Steven Clark speculated that three factors would influence the Court's decision of whether an abortion regulation is unduly burdensome. Wilkins et al. posit that in order for a regulation to avoid being found unduly burdensome: (1) it must be firmly grounded in an articulated state interest; (2) it must not completely bar access to abortion services; and (3) it must actually further the articulated state interest. Many scholars have argued that the unduly burdensome standard is inherently unworkable. Richard G. Wilkins et. al., *Mediating the Polar Extremes: A Guide to Post-Webster Policy*, 1991 BYU L. REV. 403, 440 (1991). Elizabeth A. Schneider, for example, asserts that the new standard is unworkable because it "invite[s] courts to ground their decisions in judges' subjective analysis. This becomes especially problematic when judges have limited knowledge about the availability of abortion" and because the test fails to assess each woman's individual needs in the unique situation of an abortion. Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMPLE L. REV. 1003, 1031-34 (1993).

[178] *Casey*, 505 U.S. at 877.

[179] Sylvia A. Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 924 (1992) (citing City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 464 (O'Connor, J., dissenting); *see also* Thornburgh v. Am. Coll. of

Regulations that are found not to unduly burden a woman's right to access abortion services but rather are designed to persuade her to choose childbirth over abortion are analyzed under the reasonable relationship standard, and, as a result, will almost always be deemed constitutional.[180]

The Supreme Court's jurisprudence in this area seems clear on this point. The Court has yet to interpret the Constitution as creating an affirmative obligation upon the state to provide the necessary conditions in which citizens can freely exercise abortion rights.[181] Instead, the Court informs us that the state will only be prohibited from acting in ways that deny citizens the right to avoid reproduction through the use of contraception and abortion, and then only in some circumstances. The Court's jurisprudence seems clear on a second point as well. The Court believes that the Constitution allows the state to discourage the exercise of reproductive rights so long as the state's obstacles do not operate as a bar. The "funding cases" reinforce the understanding of the nature of reproductive rights as negative, protecting the individual from state interference,[182] while the constitutionality of informed consent provisions serves as evidence that state-created obstacles are permitted so long as the

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Obstetricians & Gynecologists (ACOG), 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

[180] *Casey*, 505 U.S. at 877-78. The arguments made by the Court in the plurality opinion in *Casey* echo its author's, Justice O'Connor, position in earlier abortion cases. For example, in *Thornburgh v. ACOG*, Justice O'Connor in her dissent argues:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests [ensuring maternal health and in protecting potential human life], with heightened scrutiny reserved for instances in which the state has imposed an "undue burden" on the abortion decision . . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision" not whether a state regulation "may 'inhibit' abortions to some degree."

Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron I*, 462 U.S. 416, 463-64 (1983)). *See also* Carey v. Population Services Int'l, 431 U.S. 687 (1977) (abortion regulation not unconstitutional unless it unduly burdens the right to seek an abortion).

[181] Cherry, *Roe's Legacy*, *supra* note 108, at 725.

[182] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 809-10 (2d ed. 2002).

obstacle acts solely as a deterrent and not as an absolute bar.[183] Both types of regulations are constitutional under the standard articulated in *Casey*.

a. No Affirmative State Obligation: Prohibitions on the Public Funding of Abortion

The state can still achieve some of its goals by failing to provide assistance to pregnant women who make choices the state finds undesirable. *Maher v. Roe* and *Harris v. McRae* are important to our understanding of the undue burden standard. Although these cases were decided long before *Casey*, they nevertheless rest on the notion of undue burden; that is, as long as the government action does not act as a bar to abortion, the regulation is constitutionally permitted. In *Maher*, the Court considered whether the fundamental abortion right included a right to state funding of medically unnecessary abortions when the state funded prenatal and child birthing services.[184] In overturning the district court's holding that the regulation that authorized unequal funding violated the Equal Protection Clause of the Fourteenth Amendment, the Court stated that the district court had "misconceived the nature and the scope of the fundamental right recognized in *Roe*."[185] The *Maher* Court read *Roe* as doing no more than "protect[ing] the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[186] Ultimately, the Court held that the state's "value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds,"[187] did not amount to an undue burden, even if the result was that indigent women would be unable to access abortion services as a result of their poverty.[188] As is often quoted, the Court noted:

> An indigent woman who desires an abortion suffers from no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State

[183] *Id.* at 803.

[184] Maher v. Roe, 432 U.S. 464, 466 (1977).

[185] *Id.* at 471.

[186] *Id.* at 473-74.

[187] *Id.* at 474.

[188] *Id.*

> may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation.[189]

Similarly, in *Harris*, the Court considered whether the Hyde Amendment, which severely limits the use of federal monies for the reimbursement of medically necessary abortions under Medicaid, was unconstitutional on the grounds that by denying funding for abortion, the statute denies poor women access to abortion and hence impinges on a fundamental right.[190] Again, the Court held that such governmental policies were not unduly burdensome of women's abortion right. The *Harris* Court stated:

> Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [*Roe*], it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.[191]

Hence, burdens that are not caused by direct state action are constitutionally permissible even if they act as an absolute barrier to the exercise of a fundamental right. The Court concluded that because the funding scheme imposed no governmental restrictions (or no undue burden) on women's access to abortion, the fundamental rights analysis was not appropriate.[192] Instead the court applied the rational basis test. It looked to see if the government restriction was rationally related to its objective; concluding

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[189] *Id.*

[190] Harris v. McRae, 448 U.S. 297, 301 (1980).

[191] *Id.* at 317.

[192] *Maher*, 432 U.S. at 475.

that it was so related, the Court held that there was no constitutional violation.[193]

b. An Obstacle, Not a Bar: The Constitutionality of Informed Consent and Waiting Period Provisions

Because the state's interest in the life of the fetus is "substantial," the state can regulate abortion under the undue burden standard as articulated in *Casey* as long as the purpose or effect of the statute does not place a "substantial obstacle" in the path of a woman seeking an abortion of a non-viable fetus.[194] Hence, the state may enact measures that are designed to persuade a woman to choose childbirth over abortion even if those measures are solely "persuasive" in nature and in no way further a health interest.[195] However, the state may use only those means "calculated to inform the woman's free choice, not hinder it."[196] As Justice O'Connor stated:

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulation which does no more than create a structural mechanism by which the state ... may express profound respect for the life of the unborn is permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[197]

In applying the undue burden standard to the informed consent provisions of the Pennsylvania abortion statute and overruling its earlier decisions in *City of Akron v. Akron Center for Reproductive Health*[198] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[199] the

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[193] *Id.* at 475-76.

[194] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

[195] *Id.* at 886.

[196] *Id.* at 877.

[197] *Id.*

[198] 462 U.S. 416 (1983).

[199] Thornburgh v. ACOG, 476 U.S. 747, 764 (1986). In *Thornburgh*, the Court held that, "[t]his type of compelled information is the antithesis of informed consent." *Id.* at 764.

Casey Court upheld the provisions. The Court found that the informed consent provision of the Pennsylvania statute furthers the legitimate state goal "of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[200] As long as the information that the state requires to be made available to the woman is not misleading, the statute does not amount to an undue burden to a woman seeking an abortion.[201]

In sum, the *Casey* Court articulated a new standard for laws and regulations that restrain the abortion decision. With regard to the non-viable fetus, instead of requiring the state to meet the burden of strict scrutiny by demonstrating that its interest is compelling and that its action is narrowly tailored to protect that interest, the state must only demonstrate that its restraint does not unduly burden the individual woman's right to abortion. Ultimately, the state may regulate the abortion of a not-yet-viable fetus so long as the state does not place a substantial obstacle in the way of a woman pursuing an abortion. With regard to a viable fetus, the state may prohibit its abortion because the state's interest becomes compelling at the point of viability; the only way to preserve the state's interest is to prohibit abortion at that point.

Since the undue burden standard allows for greater state intervention than the *Roe* standard did, the unduly burdensome standard can be understood as a standard meant to protect pregnant women from only the most serious forms of state coercion, of which prevention of decision making is but one form. In other words, in order to determine whether the state has unduly burdened a woman's abortion, privacy, or liberty right, two questions need to be asked. The first is the question asked by the *Casey* Court: does the law prevent reproductive decision making? This Article argues that the second question is the broader one implied by the Court: does the state action result in any impermissible form of coercion?

What remains to be answered with regard to the violation of reproductive rights is whether the detention, confinement, or commitment of a pregnant woman for the benefit of fetal health is unduly burdensome. Does this state intervention prevent reproductive decision making, or does it subject pregnant women to a serious form of state coercion through threats and the loss of liberty? If the state action results in either outcome, it should be deemed unconstitutional under the undue burden standard.

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[200] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 882 (1992).

[201] *Id.* at 883.

3. Detention and Commitment of Pregnant Women for the Sake of Fetal Health is Unduly Burdensome

The detention and commitment of pregnant women for the benefit of fetal health, and threats thereof, are highly coercive and as such prevent reproductive decision making. To determine whether state action unduly burdens reproductive decision making, *Casey* instructs us to ask whether the state action hinders the woman's decision making or whether the state action is highly coercive. Further, as noted in *Maher* and *McRae*, the obstacle is only impermissible if it is of the state's making.[202] Any highly coercive state measure that creates a double bind for the woman and subjects her to censure or deprivation regardless of the option she chooses[203] should be deemed to be unduly burdensome of the woman's reproductive, privacy, and liberty rights under the reasoning in *Casey*.

Detention and commitment in this context are highly coercive to reproductive decision making. Coercion in this context is problematic because it violates the value of autonomous decision making, a value that is at the heart of our traditional understanding of the privacy doctrine. Both contraception and abortion cases, including *Casey*, clearly articulate that the decision whether or not to bear a child is the woman's alone until fetal viability. It is not the state's decision. By allowing detention and commitment for the benefit of fetal health, the state takes a significant part of that decision making away from the woman. The state tells the pregnant woman who is drug or alcohol dependent or who wants to make unconventional decisions about the birth of her child that she undergo the pregnancy in the way mandated by the state or be subject to incarceration or other form of state detention. This action by the state does not simply make procreation decision making more difficult; it makes decision making impossible for some. It means that some women will be forced into "choosing" between procreation and incarceration. Others will "choose" between abortion and incarceration. Neither option amounts to much of a choice. Regardless of the choice made, these women will be subjected to some sort of serious state censure that will result in the deprivation of their liberty.

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[202] Maher v. Roe, 432 U.S. 464, 466 (1977) (poverty is an obstacle not of the state's making); Harris v. McRae, 448 U.S. 297, 356 (1980) (same).

[203] Marilyn Frye, *Oppression*, *in* THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY (1983).

The second question posed above, whether state action results in an impermissible form of coercion, must be answered by a more in-depth analysis of the privacy right itself.

III. PRIVACY AS AFFIRMATIVE OBLIGATION OR ANTI-TOTALITARIAN PRINCIPLE

A. Privacy as Mandating an Affirmative State Obligation

The personhood theory of privacy articulated earlier in this article represents the most prevalent interpretation of the privacy doctrine.[204] Nevertheless, conceptualizing the right to privacy as creating an affirmative obligation on the part of the state to assist in creating the conditions under which meaningful, uncoerced, and independent decision making can occur, is another way of understanding the privacy doctrine. Undoubtedly, the Fourteenth Amendment similarly has been interpreted as requiring an affirmative state obligation to ensure that equality is fostered and protected in order for people to develop the characteristics necessary for good citizenship.[205] Under this analysis, privacy at its smallest mandate must foster conditions under which meaningful decision making can take place.[206] Protecting individuals from state coercion—in this case, state endorsed forms of mothering—or the coercion of others, must be an integral part of privacy's promise. Detaining pregnant women for the protection of fetal health is highly coercive. Detention amounts to putting pregnant women in a classic double bind where none of their possible responses are fair or acceptable. This use of state power to detain and confine coerces every pregnancy related decision. The women in these circumstances can either abort their fetuses, follow the state prescribed practices, or be subject to the physical control of the state for the duration of their pregnancies. Thus, at the very least, such coercive practices like the detention of pregnant women for the benefit of their fetuses should be deemed impermissible under this conception of privacy.

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[204] *See supra* Section II.B.

[205] *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

[206] Susan James, *The Good Enough Citizen: Female Citizenship and Independence*, *in* BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS, AND FEMALE SUBJECTIVITY 48-65, 51 (Gisela Bock & Susan James eds., 1992).

B. An Anti-totalitarian Analysis of Privacy

Jed Rubenfeld proposes yet another conception or understanding of the right to privacy. Rubenfeld argues that the right protected by privacy is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."[207] In other words, Rubenfeld believes that the rights or freedoms protected by privacy are those that protect individuals from the power of the state to control their lives. In addition, privacy as an anti-totalitarian principle "prevents the state from imposing on individuals a defined identity."[208] Therefore, privacy protects individuals from a state that might treat its citizens as instrumentalities.[209] Because he views the purpose and the content of the right to privacy slightly differently than the received wisdom of the personhood theory, Rubenfeld posits a different analysis. He believes that to better understand the contours of the right to privacy, we need not look at what the law prohibits when determining whether it violates the right to privacy. Instead, we should examine what is produced by the law. Rubenfeld argues that we must consider the affirmative aspects of the law or regulation at issue and determine whether the effect of the law is "to direct and occupy" the lives of individuals.[210] He asks whether the law at issue "operate[s] in any way to confine, normalize, and functionalize identity[.]"[211] If the law operates in such a manner, then it violates the fundamental right to privacy.

In testing his thesis, Rubenfeld considers the anti-abortion regulations at issue in *Roe v. Wade* and subsequent cases. He tries to determine what these laws produce. Do they confine, normalize, or functionalize women? He argues that these regulations violate privacy, but not because women are to be protected against state interference in personal decisions since the state interferes in the personal lives of its citizens much of the time. Rather, he argues that these regulations violate the privacy rights of women because of what they produce. They confine women to the role of motherhood with its inevitable concomitant physical, emotional, economic, and political ramifications. In sum, these laws violate privacy because they produce forced motherhood, a "pronounced bodily

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[207] Rubenfeld, *supra* note 155, at 784.

[208] *Id.* at 794.

[209] *Id.* at 790-91.

[210] *Id.* at 740.

[211] *Id.* at 788.

intervention," as well as treating women as mere instrumentalities of the state.[212] Rubenfeld asserts:

> Anti-abortion laws produce motherhood: they take diverse women with every variety of career, life-plan, and so on, and make mothers of them all. To be sure, motherhood is no unitary phenomenon that is experienced alike by all women. Nonetheless, it is difficult to imagine a state-enforced rule whose ramifications within the actual, everyday life of the act are more far-reaching. . . . [I]t creates a perceived identity for women and confines them to it; and it gathers up a multiplicity of approaches to the problem of being a woman and reduces them all to the single norm of motherhood.[213]

But what is the danger of standardization? Rubenfeld argues that the danger of standardization is the resulting treatment of individuals as "mere instruments of the state, rather than as citizens with independent minds who themselves constitute the state."[214] Standardization and instrumentalization are both products of anti-abortion laws. These developments force women to bear children for the state and in the process become "maternal environments,"[215] instead of women with interests of their own, including interests in their own bodies and their own lives. The effect of standardization and instrumentalization are also products of the detention and confinement of pregnant women for the sake of fetal health. Indeed, the Wisconsin statute permitting involuntary confinement actually refers to pregnant women as "maternal environments."[216]

The anti-totalitarian analysis proffered by Rubenfeld provides us with the opportunity to think in new ways about whether the detention, confinement, and commitment of pregnant women for the benefit of fetal health violates the right to privacy. If Rubenfeld is correct, and the proper analysis involves determining what is produced instead of looking at what activities are prohibited by the state action, then we must ask what is occurring in the context of the detention and confinement of pregnant women? Much like Rubenfeld's analysis of anti-abortion laws, we find that

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[212] *Id.* at 788.

[213] *Id.*

[214] *Id.* at 790.

[215] WIS. STAT § 48.133 (2005).

[216] *Id.*

the state action in detention and confinement produces a "pronounced bodily intervention," an obvious bodily seizure, and imposes a defined identity upon women.

Many of the detentions of pregnant women produce a "pronounced bodily intervention." The most apparent of these bodily interventions occur when pregnant women are confined to hospitals and ordered to have medical procedures to benefit their fetuses. The hospital detention with its attendant invasion of bodily integrity for surgery or other medical procedures for the health of the fetus produces a "pronounced bodily intervention on the pregnant woman."

Moreover, the detention and confinement of pregnant women for the benefit of fetal health produces bodily seizures. When pregnant women are detained in hospitals, mental health facilities, jails, or prisons for the purported benefit of fetal health, they obviously are not free to leave when they wish. In addition, they must then rely upon these state institutions for both their basic physical needs and any special needs resulting from the pregnancy. All forms of detention physically confine women's identity. The bodily seizures produced by the detentions reduce pregnant women to something less than a free citizen. Bodily seizures impose on pregnant women a defined identity—that of a bad or unacceptable mother, one not permitted the freedom of movement or decision. Detention signals that women's physical autonomy will not be protected unless women conform to state sanctioned mothering standards.

Lastly, the detention and confinement of pregnant women for the sake of fetal health produce and impose upon women a defined identity—a state legitimized form of motherhood. This form of motherhood requires that women be selfless. It requires mothers to be self-sacrificing with the penalty of state detention. Hence, the threat of detention is unlawful because coercion in this context substantially shapes women's lives by creating a normalized state-sanctioned motherhood identity for women. The creation of this identity goes hand in hand with treating pregnant women as instruments of the state whose duty is to produce healthy children.

If Rubenfeld is correct in asserting that the right to privacy is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state,"[217] then the deprivation of pregnant women's physical and decisional liberty for the purported benefit of the fetus must violate the privacy right. With the detention and commitment of pregnant women for the sake of fetal health, the state seeks to "direct and occupy" the lives of pregnant women and to treat them as instruments of the state. In the end, the result is a normalized, state-defined way of mothering.

[217] Rubenfeld, *supra* note 155, at 784.

It is this state-enforced normalization that is prevented by the protection of privacy.

IV. CONCLUSION

Judges and legislatures have used the deprivation of physical liberty, and threats thereof, as a way to prevent drug use by pregnant addicts, to compel pregnant women to access prenatal care, or to force women to submit to their physicians' directions regarding medical treatment for the benefit of fetal health. In every case, the detention of the pregnant woman was predicated upon the "right" of fetuses to be born healthy.

Even if the restriction of the physical liberty of pregnant women is well-meaning, it is unwise because it deters the pregnant women who most need prenatal care from receiving it. The restriction of the physical liberty of pregnant women is also unconstitutional because it results in an inappropriate restriction on women's right to be free from unwarranted physical restriction and on their privacy and liberty rights to reproductive decision making free of unwarranted state interference. Accordingly, detention, confinement, and incarceration of pregnant women for the benefit of fetal health violate women's constitutional rights and leave us with a jurisprudence of physical integrity and reproductive rights that permits highly coercive action on the part of the state into one of the most intimate decisions and experiences of women. If the state is permitted to detain and confine pregnant women for the benefit of fetal health, women are reduced to nothing more than fetal containers whose rights and liberties are dependent upon their acquiescence to mothering rules dictated by the state.

Finally, if the health of the fetus is of central concern, more attention must be given to the health of women, poor women in particular. The experts in this area must be listened to, including experts from the public health and medical communities and the women themselves, who can best attest to their needs. Most importantly, there needs to be a wider availability of quality prenatal care that is inexpensive or free without the threat of confinement and more drug and alcohol treatment facilities that treat pregnant women. While these suggestions are not cost free, they are no more expensive than incarcerating and confining women during their pregnancies or treating infants born with problems resulting from prenatal exposure to drugs or alcohol, or insufficient prenatal care.[218] Without proper

[218] National Committee for Quality Assurance, *Prenatal and Postpartum Care*, The State of Managed Care Quality, 2001, www.ncqa.org/somc2001/prenatal/somc

attention paid to the needs of pregnant women, fetal health will be at risk. The force of law cannot solve this problem. It can only be solved by a public policy that reflects a commitment to the real health needs of both women and children.

_2001_ppc.html (noting that based on hospital claims, the estimated cost of post natal care for women without pre-natal care was twice as much as the post natal care of a woman who received pre-natal care).